

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

House Bill 2090

BY DELEGATE ANDERSON

[INTRODUCED JANUARY 9, 2019; REFERRED

TO THE COMMITTEE ON HEALTH AND HUMAN RESOURCES

THEN THE JUDICIARY.]

1 A BILL to amend and reenact §30-3-14 of the Code of West Virginia, 1931, as amended, relating
2 to advertising by physicians and podiatrists; providing that the use of patient testimonials
3 in advertising is not per se false or deceptive advertising.

Be it enacted by the Legislature of West Virginia:

ARTICLE 3. WEST VIRGINIA MEDICAL PRACTICE ACT.

§30-3-14. Professional discipline of physicians and podiatrists; reporting of information to board pertaining to medical professional liability and professional incompetence required; penalties; grounds for license denial and discipline of physicians and podiatrist; investigations; physical and mental examinations; hearings; sanctions; summary sanctions; reporting by the board; reapplication; civil and criminal immunity; voluntary limitation of license; probable cause determination; referral to law-enforcement authorities.

1 (a) The board may independently initiate disciplinary proceedings as well as initiate
2 disciplinary proceedings based on information received from medical peer review committees,
3 physicians, podiatrists, hospital administrators, professional societies, the Board of Pharmacy,
4 and others.

5 The board may initiate investigations as to professional incompetence or other reasons
6 for which a licensed physician or podiatrist may be adjudged unqualified based upon criminal
7 convictions; complaints by citizens, pharmacists, physicians, podiatrists, peer review committees,
8 hospital administrators, professional societies, or others; or unfavorable outcomes arising out of
9 medical professional liability. The board shall initiate an investigation if it receives notice that three
10 or more judgments, or any combination of judgments and settlements resulting in five or more
11 unfavorable outcomes arising from medical professional liability, have been rendered or made
12 against the physician or podiatrist within a five-year period. The board may not consider any
13 judgments or settlements as conclusive evidence of professional incompetence or conclusive lack
14 of qualification to practice.

15 (b) Upon request of the board, any medical peer review committee in this state shall report
16 any information that may relate to the practice or performance of any physician or podiatrist known
17 to that medical peer review committee. Copies of the requests for information from a medical peer
18 review committee may be provided to the subject physician or podiatrist if, in the discretion of the
19 board, the provision of such copies will not jeopardize the board's investigation. In the event that
20 copies are provided, the subject physician or podiatrist is allowed 15 days to comment on the
21 requested information and such comments must be considered by the board.

22 The chief executive officer of every hospital shall, within 60 days after the completion of
23 the hospital's formal disciplinary procedure and also within 60 days after the commencement of
24 and again after the conclusion of any resulting legal action, report in writing to the board the name
25 of any member of the medical staff or any other physician or podiatrist practicing in the hospital
26 whose hospital privileges have been revoked, restricted, reduced, or terminated for any cause,
27 including resignation, together with all pertinent information relating to such action. The chief
28 executive officer shall also report any other formal disciplinary action taken against any physician
29 or podiatrist by the hospital upon the recommendation of its medical staff relating to professional
30 ethics, medical incompetence, medical professional liability, moral turpitude or drug or alcohol
31 abuse. Temporary suspension for failure to maintain records on a timely basis or failure to attend
32 staff or section meetings need not be reported. Voluntary cessation of hospital privileges for
33 reasons unrelated to professional competence or ethics need not be reported.

34 Any managed care organization operating in this state which provides a formal peer review
35 process shall report in writing to the board, within 60 days after the completion of any formal peer
36 review process and also within 60 days after the commencement of and again after the conclusion
37 of any resulting legal action, the name of any physician or podiatrist whose credentialing has been
38 revoked or not renewed by the managed care organization. The managed care organization shall
39 also report in writing to the board any other disciplinary action taken against a physician or
40 podiatrist relating to professional ethics, professional liability, moral turpitude, or drug or alcohol

41 abuse within 60 days after completion of a formal peer review process which results in the action
42 taken by the managed care organization. For purposes of this subsection, “managed care
43 organization” means a plan that establishes, operates, or maintains a network of health care
44 providers who have entered into agreements with and been credentialed by the plan to provide
45 health care services to enrollees or insureds to whom the plan has the ultimate obligation to
46 arrange for the provision of or payment for health care services through organizational
47 arrangements for ongoing quality assurance, utilization review programs, or dispute resolutions.

48 Any professional society in this state comprised primarily of physicians or podiatrists which
49 takes formal disciplinary action against a member relating to professional ethics, professional
50 incompetence, medical professional liability, moral turpitude, or drug or alcohol abuse shall report
51 in writing to the board within 60 days of a final decision the name of the member, together with all
52 pertinent information relating to the action.

53 Every person, partnership, corporation, association, insurance company, professional
54 society, or other organization providing professional liability insurance to a physician or podiatrist
55 in this state, including the state Board of Risk and Insurance Management, shall submit to the
56 board the following information within 30 days from any judgment or settlement of a civil or medical
57 professional liability action excepting product liability actions: The name of the insured; the date
58 of any judgment or settlement; whether any appeal has been taken on the judgment and, if so, by
59 which party; the amount of any settlement or judgment against the insured; and other information
60 required by the board.

61 Within 30 days from the entry of an order by a court in a medical professional liability
62 action or other civil action in which a physician or podiatrist licensed by the board is determined
63 to have rendered health care services below the applicable standard of care, the clerk of the court
64 in which the order was entered shall forward a certified copy of the order to the board.

65 Within 30 days after a person known to be a physician or podiatrist licensed or otherwise
66 lawfully practicing medicine and surgery or podiatry in this state or applying to be licensed is

67 convicted of a felony under the laws of this state or of any crime under the laws of this state
68 involving alcohol or drugs in any way, including any controlled substance under state or federal
69 law, the clerk of the court of record in which the conviction was entered shall forward to the board
70 a certified true and correct abstract of record of the convicting court. The abstract shall include
71 the name and address of the physician or podiatrist or applicant, the nature of the offense
72 committed, and the final judgment and sentence of the court.

73 Upon a determination of the board that there is probable cause to believe that any person,
74 partnership, corporation, association, insurance company, professional society, or other
75 organization has failed or refused to make a report required by this subsection, the board shall
76 provide written notice to the alleged violator stating the nature of the alleged violation and the time
77 and place at which the alleged violator shall appear to show good cause why a civil penalty should
78 not be imposed. The hearing shall be conducted in accordance with §29A-5-1 *et seq.* of this code.
79 After reviewing the record of the hearing, if the board determines that a violation of this subsection
80 has occurred, the board shall assess a civil penalty of not less than \$1,000 nor more than \$10,000
81 against the violator. The board shall notify any person so assessed of the assessment in writing
82 and the notice shall specify the reasons for the assessment. If the violator fails to pay the amount
83 of the assessment to the board within 30 days, the Attorney General may institute a civil action in
84 the Circuit Court of Kanawha County to recover the amount of the assessment. In any civil action,
85 the court's review of the board's action shall be conducted in accordance with §29A-5-4 of this
86 code. Notwithstanding any other provision of this article to the contrary, when there are conflicting
87 views by recognized experts as to whether any alleged conduct breaches an applicable standard
88 of care, the evidence must be clear and convincing before the board may find that the physician
89 or podiatrist has demonstrated a lack of professional competence to practice with a reasonable
90 degree of skill and safety for patients.

91 Any person may report to the board relevant facts about the conduct of any physician or
92 podiatrist in this state which in the opinion of that person amounts to medical professional liability

93 or professional incompetence.

94 The board shall provide forms for filing reports pursuant to this section. Reports submitted
95 in other forms shall be accepted by the board.

96 The filing of a report with the board pursuant to any provision of this article, any
97 investigation by the board, or any disposition of a case by the board does not preclude any action
98 by a hospital, other health care facility, or professional society comprised primarily of physicians
99 or podiatrists to suspend, restrict, or revoke the privileges or membership of the physician or
100 podiatrist.

101 (c) The board may deny an application for license or other authorization to practice
102 medicine and surgery or podiatry in this state and may discipline a physician or podiatrist licensed
103 or otherwise lawfully practicing in this state who, after a hearing, has been adjudged by the board
104 as unqualified due to any of the following reasons:

105 (1) Attempting to obtain, obtaining, renewing, or attempting to renew a license to practice
106 medicine and surgery or podiatry by bribery, fraudulent misrepresentation, or through known error
107 of the board;

108 (2) Being found guilty of a crime in any jurisdiction, which offense is a felony, involves
109 moral turpitude, or directly relates to the practice of medicine. Any plea of nolo contendere is a
110 conviction for the purposes of this subdivision;

111 (3) False or deceptive advertising: Provided, That the use of patient testimonials by a
112 physician or a podiatrist in advertising his or her practice, is not per se false or deceptive
113 advertising.

114 (4) Aiding, assisting, procuring, or advising any unauthorized person to practice medicine
115 and surgery or podiatry contrary to law;

116 (5) Making or filing a report that the person knows to be false; intentionally or negligently
117 failing to file a report or record required by state or federal law; willfully impeding or obstructing
118 the filing of a report or record required by state or federal law; or inducing another person to do

119 any of the foregoing. The reports and records covered in this subdivision mean only those that
120 are signed in the capacity as a licensed physician or podiatrist;

121 (6) Requesting, receiving, or paying directly or indirectly a payment, rebate, refund,
122 commission, credit, or other form of profit or valuable consideration for the referral of patients to
123 any person or entity in connection with providing medical or other health care services or clinical
124 laboratory services, supplies of any kind, drugs, medication, or any other medical goods, services,
125 or devices used in connection with medical or other health care services;

126 (7) Unprofessional conduct by any physician or podiatrist in referring a patient to any
127 clinical laboratory or pharmacy in which the physician or podiatrist has a proprietary interest
128 unless the physician or podiatrist discloses in writing such interest to the patient. The written
129 disclosure shall indicate that the patient may choose any clinical laboratory for purposes of having
130 any laboratory work or assignment performed or any pharmacy for purposes of purchasing any
131 prescribed drug or any other medical goods or devices used in connection with medical or other
132 health care services;

133 As used in this subdivision, "proprietary interest" does not include an ownership interest
134 in a building in which space is leased to a clinical laboratory or pharmacy at the prevailing rate
135 under a lease arrangement that is not conditional upon the income or gross receipts of the clinical
136 laboratory or pharmacy;

137 (8) Exercising influence within a patient-physician relationship for the purpose of engaging
138 a patient in sexual activity;

139 (9) Making a deceptive, untrue, or fraudulent representation in the practice of medicine
140 and surgery or podiatry;

141 (10) Soliciting patients, either personally or by an agent, through the use of fraud,
142 intimidation, or undue influence;

143 (11) Failing to keep written records justifying the course of treatment of a patient, including,
144 but not limited to, patient histories, examination and test results, and treatment rendered, if any;

145 (12) Exercising influence on a patient in such a way as to exploit the patient for financial
146 gain of the physician or podiatrist or of a third party. Any influence includes, but is not limited to,
147 the promotion or sale of services, goods, appliances, or drugs;

148 (13) Prescribing, dispensing, administering, mixing, or otherwise preparing a prescription
149 drug, including any controlled substance under state or federal law, other than in good faith and
150 in a therapeutic manner in accordance with accepted medical standards and in the course of the
151 physician's or podiatrist's professional practice. A physician who discharges his or her
152 professional obligation to relieve the pain and suffering and promote the dignity and autonomy of
153 dying patients in his or her care and, in so doing, exceeds the average dosage of a pain relieving
154 controlled substance, as defined in Schedules II and III of the Uniform Controlled Substance Act,
155 does not violate this article;

156 (14) Performing any procedure or prescribing any therapy that, by the accepted standards
157 of medical practice in the community, would constitute experimentation on human subjects
158 without first obtaining full, informed, and written consent;

159 (15) Practicing or offering to practice beyond the scope permitted by law or accepting and
160 performing professional responsibilities that the person knows or has reason to know he or she
161 is not competent to perform;

162 (16) Delegating professional responsibilities to a person when the physician or podiatrist
163 delegating the responsibilities knows or has reason to know that the person is not qualified by
164 training, experience, or licensure to perform them;

165 (17) Violating any provision of this article or a rule or order of the board or failing to comply
166 with a subpoena or subpoena duces tecum issued by the board;

167 (18) Conspiring with any other person to commit an act or committing an act that would
168 tend to coerce, intimidate, or preclude another physician or podiatrist from lawfully advertising his
169 or her services;

170 (19) Gross negligence in the use and control of prescription forms;

171 (20) Professional incompetence;

172 (21) The inability to practice medicine and surgery or podiatry with reasonable skill and
173 safety due to physical or mental impairment, including deterioration through the aging process,
174 loss of motor skill, or abuse of drugs or alcohol. A physician or podiatrist adversely affected under
175 this subdivision shall be afforded an opportunity at reasonable intervals to demonstrate that he or
176 she may resume the competent practice of medicine and surgery or podiatry with reasonable skill
177 and safety to patients. In any proceeding under this subdivision, neither the record of proceedings
178 nor any orders entered by the board shall be used against the physician or podiatrist in any other
179 proceeding; or

180 (22) Knowingly failing to report to the board any act of gross misconduct committed by
181 another licensee of the board.

182 (d) The board shall deny any application for a license or other authorization to practice
183 medicine and surgery or podiatry in this state to any applicant, and shall revoke the license of any
184 physician or podiatrist licensed or otherwise lawfully practicing within this state who, is found guilty
185 by any court of competent jurisdiction of any felony involving prescribing, selling, administering,
186 dispensing, mixing, or otherwise preparing any prescription drug, including any controlled
187 substance under state or federal law, for other than generally accepted therapeutic purposes.
188 Presentation to the board of a certified copy of the guilty verdict or plea rendered in the court is
189 sufficient proof thereof for the purposes of this article. A plea of nolo contendere has the same
190 effect as a verdict or plea of guilt. Upon application of a physician that has had his or her license
191 revoked because of a drug related felony conviction, upon completion of any sentence of
192 confinement, parole, probation, or other court-ordered supervision and full satisfaction of any
193 fines, judgments, or other fees imposed by the sentencing court, the board may issue the
194 applicant a new license upon a finding that the physician is, except for the underlying conviction,
195 otherwise qualified to practice medicine: *Provided*, That the board may place whatever terms,
196 conditions, or limitations it deems appropriate upon a physician licensed pursuant to this

197 subsection.

198 (e) The board may refer any cases coming to its attention to an appropriate committee of
199 an appropriate professional organization for investigation and report. Except for complaints
200 related to obtaining initial licensure to practice medicine and surgery or podiatry in this state by
201 bribery or fraudulent misrepresentation, any complaint filed more than two years after the
202 complainant knew, or in the exercise of reasonable diligence should have known, of the existence
203 of grounds for the complaint shall be dismissed: *Provided*, That in cases of conduct alleged to be
204 part of a pattern of similar misconduct or professional incapacity that, if continued, would pose
205 risks of a serious or substantial nature to the physician's or podiatrist's current patients, the
206 investigating body may conduct a limited investigation related to the physician's or podiatrist's
207 current capacity and qualification to practice and may recommend conditions, restrictions, or
208 limitations on the physician's or podiatrist's license to practice that it considers necessary for the
209 protection of the public. Any report shall contain recommendations for any necessary disciplinary
210 measures and shall be filed with the board within 90 days of any referral. The recommendations
211 shall be considered by the board and the case may be further investigated by the board. The
212 board after full investigation shall take whatever action it considers appropriate, as provided in
213 this section.

214 (f) The investigating body, as provided in §30-3-14(e) of this code, may request and the
215 board under any circumstances may require a physician or podiatrist or person applying for
216 licensure or other authorization to practice medicine and surgery or podiatry in this state to submit
217 to a physical or mental examination by a physician or physicians approved by the board. A
218 physician or podiatrist submitting to an examination has the right, at his or her expense, to
219 designate another physician to be present at the examination and make an independent report to
220 the investigating body or the board. The expense of the examination shall be paid by the board.
221 Any individual who applies for or accepts the privilege of practicing medicine and surgery or
222 podiatry in this state is considered to have given his or her consent to submit to all examinations

223 when requested to do so in writing by the board and to have waived all objections to the
224 admissibility of the testimony or examination report of any examining physician on the ground that
225 the testimony or report is privileged communication. If a person fails or refuses to submit to an
226 examination under circumstances which the board finds are not beyond his or her control, failure
227 or refusal is prima facie evidence of his or her inability to practice medicine and surgery or podiatry
228 competently and in compliance with the standards of acceptable and prevailing medical practice.

229 (g) In addition to any other investigators it employs, the board may appoint one or more
230 licensed physicians to act for it in investigating the conduct or competence of a physician.

231 (h) In every disciplinary or licensure denial action, the board shall furnish the physician or
232 podiatrist or applicant with written notice setting out with particularity the reasons for its action.
233 Disciplinary and licensure denial hearings shall be conducted in accordance with §29A-5-1 *et seq.*
234 of this code. However, hearings shall be heard upon sworn testimony and the rules of evidence
235 for trial courts of record in this state shall apply to all hearings. A transcript of all hearings under
236 this section shall be made, and the respondent may obtain a copy of the transcript at his or her
237 expense. The physician or podiatrist has the right to defend against any charge by the introduction
238 of evidence, the right to be represented by counsel, the right to present and cross examine
239 witnesses and the right to have subpoenas and subpoenas duces tecum issued on his or her
240 behalf for the attendance of witnesses and the production of documents. The board shall make
241 all its final actions public. The order shall contain the terms of all action taken by the board.

242 (i) In disciplinary actions in which probable cause has been found by the board, the board
243 shall, within 20 days of the date of service of the written notice of charges or 60 days prior to the
244 date of the scheduled hearing, whichever is sooner, provide the respondent with the complete
245 identity, address, and telephone number of any person known to the board with knowledge about
246 the facts of any of the charges; provide a copy of any statements in the possession of or under
247 the control of the board; provide a list of proposed witnesses with addresses and telephone
248 numbers, with a brief summary of his or her anticipated testimony; provide disclosure of any trial

249 expert pursuant to the requirements of Rule 26(b)(4) of the West Virginia Rules of Civil Procedure;
250 provide inspection and copying of the results of any reports of physical and mental examinations
251 or scientific tests or experiments; and provide a list and copy of any proposed exhibit to be used
252 at the hearing: *Provided*, That the board shall not be required to furnish or produce any materials
253 which contain opinion work product information or would be a violation of the attorney-client
254 privilege. Within 20 days of the date of service of the written notice of charges, the board shall
255 disclose any exculpatory evidence with a continuing duty to do so throughout the disciplinary
256 process. Within 30 days of receipt of the board's mandatory discovery, the respondent shall
257 provide the board with the complete identity, address, and telephone number of any person known
258 to the respondent with knowledge about the facts of any of the charges; provide a list of proposed
259 witnesses with addresses and telephone numbers, to be called at hearing, with a brief summary
260 of his or her anticipated testimony; provide disclosure of any trial expert pursuant to the
261 requirements of Rule 26(b)(4) of the West Virginia Rules of Civil Procedure; provide inspection
262 and copying of the results of any reports of physical and mental examinations or scientific tests
263 or experiments; and provide a list and copy of any proposed exhibit to be used at the hearing.

264 (j) Whenever it finds any person unqualified because of any of the grounds set forth in
265 §30-3-14(c) of this code, the board may enter an order imposing one or more of the following:

266 (1) Deny his or her application for a license or other authorization to practice medicine and
267 surgery or podiatry;

268 (2) Administer a public reprimand;

269 (3) Suspend, limit, or restrict his or her license or other authorization to practice medicine
270 and surgery or podiatry for not more than five years, including limiting the practice of that person
271 to, or by the exclusion of, one or more areas of practice, including limitations on practice privileges;

272 (4) Revoke his or her license or other authorization to practice medicine and surgery or
273 podiatry or to prescribe or dispense controlled substances for any period of time, including for the
274 life of the licensee, that the board may find to be reasonable and necessary according to evidence

275 presented in a hearing before the board or its designee;

276 (5) Require him or her to submit to care, counseling, or treatment designated by the board
277 as a condition for initial or continued licensure or renewal of licensure or other authorization to
278 practice medicine and surgery or podiatry;

279 (6) Require him or her to participate in a program of education prescribed by the board;

280 (7) Require him or her to practice under the direction of a physician or podiatrist designated
281 by the board for a specified period of time; and

282 (8) Assess a civil fine of not less than \$1,000 nor more than \$10,000.

283 (k) Notwithstanding the provisions of §30-1-8 of this code, if the board determines the
284 evidence in its possession indicates that a physician's or podiatrist's continuation in practice or
285 unrestricted practice constitutes an immediate danger to the public, the board may take any of
286 the actions provided in §30-3-4(j) of this code on a temporary basis and without a hearing if
287 institution of proceedings for a hearing before the board are initiated simultaneously with the
288 temporary action and begin within 15 days of the action. The board shall render its decision within
289 five days of the conclusion of a hearing under this subsection.

290 (l) Any person against whom disciplinary action is taken pursuant to this article has the
291 right to judicial review as provided in §29A-5-1 *et seq.* and §29A-6-1 *et seq.* of this code: *Provided,*
292 That a circuit judge may also remand the matter to the board if it appears from competent
293 evidence presented to it in support of a motion for remand that there is newly discovered evidence
294 of such a character as ought to produce an opposite result at a second hearing on the merits
295 before the board and:

296 (1) The evidence appears to have been discovered since the board hearing; and

297 (2) The physician or podiatrist exercised due diligence in asserting his or her evidence
298 and that due diligence would not have secured the newly discovered evidence prior to the appeal.

299 A person may not practice medicine and surgery or podiatry or deliver health care services
300 in violation of any disciplinary order revoking, suspending, or limiting his or her license while any

301 appeal is pending. Within 60 days, the board shall report its final action regarding restriction,
302 limitation, suspension, or revocation of the license of a physician or podiatrist, limitation on
303 practice privileges, or other disciplinary action against any physician or podiatrist to all appropriate
304 state agencies, appropriate licensed health facilities and hospitals, insurance companies or
305 associations writing medical malpractice insurance in this state, the American Medical
306 Association, the American Podiatry Association, professional societies of physicians or podiatrists
307 in the state, and any entity responsible for the fiscal administration of Medicare and Medicaid.

308 (m) Any person against whom disciplinary action has been taken under this article shall,
309 at reasonable intervals, be afforded an opportunity to demonstrate that he or she can resume the
310 practice of medicine and surgery or podiatry on a general or limited basis. At the conclusion of a
311 suspension, limitation, or restriction period the physician or podiatrist may resume practice if the
312 board has so ordered.

313 (n) Any entity, organization or person, including the board, any member of the board, its
314 agents or employees and any entity or organization or its members referred to in this article, any
315 insurer, its agents or employees, a medical peer review committee and a hospital governing
316 board, its members or any committee appointed by it acting without malice and without gross
317 negligence in making any report or other information available to the board or a medical peer
318 review committee pursuant to law and any person acting without malice and without gross
319 negligence who assists in the organization, investigation, or preparation of any such report or
320 information or assists the board or a hospital governing body or any committee in carrying out any
321 of its duties or functions provided by law is immune from civil or criminal liability, except that the
322 unlawful disclosure of confidential information possessed by the board is a misdemeanor as
323 provided in this article.

324 (o) A physician or podiatrist may request in writing to the board a limitation on or the
325 surrendering of his or her license to practice medicine and surgery or podiatry or other appropriate
326 sanction as provided in this section. The board may grant the request and, if it considers it

327 appropriate, may waive the commencement or continuation of other proceedings under this
328 section. A physician or podiatrist whose license is limited or surrendered or against whom other
329 action is taken under this subsection may, at reasonable intervals, petition for removal of any
330 restriction or limitation on or for reinstatement of his or her license to practice medicine and
331 surgery or podiatry.

332 (p) In every case considered by the board under this article regarding discipline or
333 licensure, whether initiated by the board or upon complaint or information from any person or
334 organization, the board shall make a preliminary determination as to whether probable cause
335 exists to substantiate charges of disqualification due to any reason set forth in §30-3-14(c) of this
336 code. If probable cause is found to exist, all proceedings on the charges shall be open to the
337 public who are entitled to all reports, records, and nondeliberative materials introduced at the
338 hearing, including the record of the final action taken: *Provided*, That any medical records, which
339 were introduced at the hearing and which pertain to a person who has not expressly waived his
340 or her right to the confidentiality of the records, may not be open to the public nor is the public
341 entitled to the records.

342 (q) If the board receives notice that a physician or podiatrist has been subjected to
343 disciplinary action or has had his or her credentials suspended or revoked by the board, a hospital
344 or a professional society, as defined in §30-3-14(b) of this code, for three or more incidents during
345 a five-year period, the board shall require the physician or podiatrist to practice under the direction
346 of a physician or podiatrist designated by the board for a specified period of time to be established
347 by the board.

348 (r) Notwithstanding any other provisions of this article, the board may, at any time, on its
349 own motion, or upon motion by the complainant, or upon motion by the physician or podiatrist, or
350 by stipulation of the parties, refer the matter to mediation. The board shall obtain a list from the
351 West Virginia State Bar's mediator referral service of certified mediators with expertise in
352 professional disciplinary matters. The board and the physician or podiatrist may choose a

353 mediator from that list. If the board and the physician or podiatrist are unable to agree on a
354 mediator, the board shall designate a mediator from the list by neutral rotation. The mediation
355 shall not be considered a proceeding open to the public, and any reports and records introduced
356 at the mediation shall not become part of the public record. The mediator and all participants in
357 the mediation shall maintain and preserve the confidentiality of all mediation proceedings and
358 records. The mediator may not be subpoenaed or called to testify or otherwise be subject to
359 process requiring disclosure of confidential information in any proceeding relating to or arising out
360 of the disciplinary or licensure matter mediated: *Provided*, That any confidentiality agreement and
361 any written agreement made and signed by the parties as a result of mediation may be used in
362 any proceedings subsequently instituted to enforce the written agreement. The agreements may
363 be used in other proceedings if the parties agree in writing.

364 (s) A physician licensed under this article may not be disciplined for providing expedited
365 partner therapy in accordance with §16-4F-1 *et seq.* of this code.

366 (t) Whenever the board receives credible information that a licensee of the board is
367 engaging or has engaged in criminal activity or the commission of a crime under state or federal
368 law, the board shall report the information, to the extent that sensitive or confidential information
369 may be publicly disclosed under law, to the appropriate state or federal law-enforcement authority
370 and/or prosecuting authority. This duty exists in addition to and is distinct from the reporting
371 required under federal law for reporting actions relating to health care providers to the United
372 States Department of Health and Human Services.

NOTE: The purpose of this bill is to provide that the use of patient testimonials in advertising
by physicians and podiatrists is not per se false or deceptive advertising.

Strike-throughs indicate language that would be stricken from a heading or the present law
and underscoring indicates new language that would be added.